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Forest Service

36 CFR Parts 215 and 217

**Notice, Comment, and Appeal Procedures
for National Forest System Projects and
Activities; Requesting Review of National
Forest Plans and Project Decisions; Final
Rule**

DEPARTMENT OF AGRICULTURE**Forest Service****36 CFR Parts 215 and 217****Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities; Requesting Review of National Forest Plans and Project Decisions****AGENCY:** Forest Service, USDA.**ACTION:** Final rule.

SUMMARY: This final rule revises the process for administrative review of National Forest System management decisions as required by Section 322 of the Department of the Interior and Related Agencies Appropriations Act for fiscal year 1993. The intended effect is to provide the public with timely notice and opportunity to comment on proposed actions implementing national forest land and resource management plans and to provide consistent procedures by which the public may appeal decisions on those actions.

EFFECTIVE DATES: This rule is effective November 4, 1993, except § 215.5 is effective January 3, 1994.

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SUPPLEMENTARY INFORMATION:**Background**

The Forest Service is responsible for managing 191 million acres in National Forests, National Grasslands, and other areas known collectively as the National Forest System. The Chief of the Forest Service, through a line organization of regional foresters, forest supervisors and district rangers, manages the surface resources and in some instances, the subsurface resources, of these lands.

Under the regulations at 36 CFR part 217, the Department, at its own discretion, has provided a process by which persons or organizations may appeal National Forest System management decisions. Until the 1993 Interior and Related Agencies Appropriations Act (hereafter the Act), there was no statutory requirement that the Forest Service provide an appeal procedure.

Section 322 of the Act established in law a two-tiered system of notice and opportunity to comment on project level decisions affecting the National Forest System. The first tier established a process by which persons or organizations receive notice and the opportunity to comment on proposed

actions. The second tier established procedures by which persons or organizations may appeal decisions subsequently made on planned actions.

On April 14, 1993, the Forest Service published a proposed rule to implement section 322 of the Act (58 FR 19369). An initial 15-day comment period was subsequently extended to June 1, 1993, in response to public request. (58 FR 19369).

In addition to publishing the proposed rule in the *Federal Register*, the Forest Service gave direct notice of the proposed rule to numerous interested parties and invited comments. Agency personnel also held briefings around the country for the public and various organizations and government agencies. Over 9,000 individuals from every State in the Union submitted comments on the proposed rule. In addition, comments were received from representatives of Federal, State, and local government agencies; colleges and schools, environmental groups, Indian tribes, media, professional associations, and industry groups (both timber and nontimber). Most comments came in individually written letters, but a number of form letters and petitions were also received, each containing numerous signatures. All suggestions and comments have been reviewed and considered in preparation of this final rule.

General Comments

Both supporters and opponents addressed many of the same issues from opposing viewpoints, and both requested clarifications or changes to timeframes in the proposed regulations.

About 80 percent of respondents generally supported the proposed rule; the remaining twenty percent were generally opposed. Those who generally supported the rule as proposed stated that the changes would streamline the appeals process. However, these respondents emphasized the need to require "standing" for appellants, the necessity for exemptions from the appeal process to expedite salvage harvesting of dead and dying timber, the need for a "finite" time period for the disposition of appeals to prevent unnecessary delays in implementing projects, and the need for only a single level of review. These supporters repeatedly stressed the economic impacts on people, communities, and local industries from the delay in implementation of projects resulting from the current appeals process. Also, most of the supporters objected to allowing oral comments on proposed actions and preferred that the final rule

require appellants to express their concerns about a specific project in writing.

Those who generally opposed the proposed rule contended that the proposal violated the spirit, intent, and letter of the Act and the Forest Service's own statements regarding public involvement by eliminating Section 322's requirement of mail notification of agency proposed actions to those who request it; by limiting the public's ability to appeal certain agency actions; and by placing unnecessary process burdens on appellants and "commenters" by not using a postmark to determine timeliness. Opponents also expressed concern that the Forest Service would abuse the discretion provided by the proposed exemption from appeal for "emergency situations," and that the use of fellow line officers for administrative reviews of an agency official's decision would constitute a "buddy system" that biases the reviews.

Section-by-Section Comments

The following summarizes the major changes to the proposed regulations made as a result of the Department's review of public comments on the proposed regulations.

The proposed regulations had three subparts; Subpart A—Public Notice and Comment, Subpart B—Appeal of Project and Activity Decisions, and Subpart C—Appeal of Regional Guides and National Forest Land and Resource Management Plans. Much of Subparts A and B were identical or very similar. In the final regulations, Subpart A and B have been combined and simplified where possible. All definitions are now in one place and the number of sections is reduced.

Subpart C has been eliminated. Very few comments were received on this section. Since the planning regulation at 36 CFR part 219 is being revised and may result in a new rule, it makes little sense to modify the appeal regulations for Forest plans until such time as this planning direction is completed. Rather than provide a new and separate set of regulations, the Department will continue to use the appeal regulations at 36 CFR part 217 for appeal of decisions dealing with approval, revision, or amendments of a forest plan as well as approval and amendment of a regional guide. The final rule includes conforming amendments to the regulations at 36 CFR part 217, which are necessary to reflect that projects and activities implementing forest plans are now appealable only under part 215 unless a project or activity decision is included as part of a forest plan or a significant amendment or revision of a

forest plan. The need for revising the appeal regulations at 36 CFR part 217 for forest plan appeals will be reviewed once a decision is made on questions concerning new information for implementation, amendment, and revision of forest plans.

Proposed sections 215.1 and 215.2. A review of comments indicated it would be unnecessarily complex to retain two different subparts; thus in the final rule, §§ 215.1 and 215.2 combine the purpose and scope and definitions into one rule. Additionally, public comment indicated the need for clarification of several terms. Accordingly, the final rule includes several additional terms, rephrases other terms and deletes one term. Those terms that are new or reworded are listed and defined below. The Department believes these will help clarify the requirements and intent of the rule.

Appeal Period. As used in the final rule, the appeal period is the time during which an appeal may be filed.

Appeal Review Officer. This term was changed in the final rule to Appeal Reviewing Officer to be consistent with the title of Appeal Deciding Officer.

Appellant. The definition in the final rule was expanded to include organizations, in addition to people.

Notice of Decision. This term was defined in the proposed regulation but is not included in the final rule, because section 215.9 in the final rule clearly sets out the process and requirements for giving notice of any decision which has been subject to the notice and comment provisions of this rule.

Intervenor. In the final rule, this term is replaced by "interested party." The term "intervenor" implied a formal, legal relationship, which is not the case. "Interested party" was selected because it implies a less formal relationship and better describes who may be involved in an appeal.

Proposed Timber Harvest Categorically excluded from documentation under Forest Service Handbook 1909.12, section 31.2, paragraph 4. This definition has been moved from § 215.3 of the proposed rule so that this lengthy definition will not have to be repeated throughout the rule whenever there is a need to refer to proposed timber harvest categorically excluded from documentation in an environmental assessment or environmental impact statement.

Proposed Sections 215.3 and 215.4. Proposed § 215.3 listed those proposed actions that would be subject to notice and comment prior to decisions. These included proposed actions implementing national forest land and resource management plans (LRMPs),

including nonsignificant amendments; certain timber harvest actions which are categorically excluded from documentation in an Environmental Assessment (EA) or Environmental Impact Statement (EIS) and forestry research or state and private forestry actions carried out in national forest plans. This section also covered notice of and comment on proposed actions on those few forests where LRMPs are not yet approved. By contrast, proposed § 215.4 listed these proposed actions not subject to the new pre-decisional notice and comment requirements of section 322 of the Act.

Respondents supported limiting notice and comment to those projects which would be analyzed and documented in an EA and Finding of No Significant Impact (FONSI), since projects requiring an EIS are already subject to notice and comment requirements through NEPA compliance procedures.

Respondents also generally supported giving notice and opportunity to comment on timber sales that are normally categorically excluded from documentation in an EA or EIS. However, many respondents felt the rule should require notice and opportunity to comment on all proposed actions that are categorically excluded. These respondents expressed concern that exempting actions from notice and comment would prevent the public from knowing what the Forest Service is doing; they also objected to decisions currently subject to appeal under the rule at 36 CFR part 217 not being subject to appeal under the proposed rule. Many others were unaware of the Forest Service Handbook categories and so did not know what actions were covered by the proposed rule.

The proposed rule also included a provision at § 215.4(b) to exempt emergency actions from public notice and comment and to permit the Chief or Regional Forester to exempt an emergency action from appeals. Over 50 percent of respondents believe it is critical for the regulations to allow the agency to harvest dead and dying timber quickly, through salvage sales, before the timber's value is lost due to decay. Supporters of the emergency provision of the proposed rule often noted that the ability to waive the appeal process for emergency situations is necessary to achieve timely salvage.

Others stated that they distrusted the motives for the emergency provision. These reviewers feared that the Forest Service would abuse this provision by using it as an excuse to cut more trees and as an excuse to limit public input, thereby depriving the American people

of the opportunity to contribute their ideas and opinions on the management of their National Forests. Many believed that the Forest Service would not inform the public about agency emergency plans.

Some proponents and opponents asked that "emergency situation" be defined more specifically. Several other reviewers pointed out that the Act does not provide for exemption of notice, comment, and appeal for proposed actions dealing with emergencies, but only provides for an exemption to the automatic stay provision if the Chief determines that an emergency situation exists with respect to a decision of the Forest Service.

Response. Although it may not seem consistent to have only one category of categorical exclusion subject to notice and comment, and subsequently, to appeal, there are good reasons to do so. Category 4 exclusions are for timber harvest of less than 250,000 board feet or salvage of 1,000,000 board feet of merchantable timber. In contrast to other proposed actions which may be categorically excluded, timber sales are often controversial and of keen public interest, even where impacts are minimal. If these decisions were exempted from notice and comment, the Forest Service might give the appearance of trying to shelter timber sales from appeal, with the result that agency credibility could be questioned.

As to concerns that the public would be unaware of other projects that are categorically excluded, public involvement in project planning is required by the Forest Service procedures which implement the National Environmental Policy Act (NEPA) including projects which may be categorically excluded. Therefore, interested and affected persons do have opportunity to keep up with categorically excluded activities. However, by their very nature, proposed actions that may be categorically excluded from documentation in an EA or EIS have little to no environmental effect. Therefore, providing additional notice and comment and, thus, appeal of these actions would be superfluous, except for timber sales. Therefore, the final rule retains notice and comment on only Category 4 (timber sale) categorical exclusions.

In response to concerns that the Forest Service could abuse the emergency exemption provision, §§ 215.3 and 215.4 have been revised to make emergency actions subject to notice and comment procedures. This will assure that the public receives timely information about such projects and preserves subsequent opportunity

to appeal such decisions under the new rule.

Based on further Departmental consideration, the notice and comment requirement for nonsignificant amendments is limited in the final rule to nonsignificant amendments that would be included as part of a project decision implementing national forest land and resource management plans. Decisions on nonsignificant amendments that are not included as part of a decision on a proposed action remain subject to the rules at 36 CFR part 217.

A number of respondents noted that the proposed rule did not meet the requirement of section 322 with respect to mailing a notice to those who have requested it and those known to have participated in the decisionmaking process.

Response. These respondents are correct. Accordingly, the final rule at § 215.5(b) provides that the Responsible Official shall promptly mail the environmental assessment with a letter identifying the proposed action or (for categorically excluded actions) a letter briefly describing the proposed action, to those who have requested notice and to persons who are known to have participated in the decisionmaking process. It should be noted that the wording of the final rule is slightly different from the wording in the Act. The Act refers to "mailing notice about the proposed action," whereas the final rule is written to require mailing the environmental assessment or letter describing the action. Rather than mailing a notice of the availability of documents and requiring members of the public then to request the actual documents, the final rule would require that the documents be sent initially. This is simpler and allows the public sufficient time to review the documents.

Proposed § 215.6. This section of the proposed rule addressed how comments were to be filed. The proposed rule used the date of actual receipt by the agency, rather than the postmark at time of mailing, as evidence of timely filing of comments within the 30-day predecisional comment period as well as for the later filing of appeals (proposed § 215.28, final § 215.13).

Many believed this proposed provision would place an undue burden on those who wished to submit comments and on appellants, because the speed and assurance of timely delivery by the Post Office or other carrier is beyond the person's control. Many also felt that this requirement would effectively reduce to less than 14 days the time available to review the proposed action and to provide

constructive comments, because people must often wait for information on a project from the Forest Service. These respondents conjectured that, after receiving the requested information, they would have to mail their comments or appeals at least 7 days before the deadline to assure that they would be received by the Forest Service on time. In addition, some people felt that not using the postmark penalized rural residents and non-local appellants who would find it burdensome and costly to ensure direct receipt.

Many stated that if a postmark is good enough for the Internal Revenue Service, it should be good enough for the Forest Service. They advocated the retention of the postmark or other device, such as facsimile imprint, to provide evidence of timely filing within the comment or appeal period. Some people mentioned the possibility of abuse if the Forest Service were responsible for documenting receipt.

Concern also was expressed that under the proposed rule (§ 215.6(c)(2)) comments would not be considered if they were late. These reviewers felt that having a rigid cut off date would overly restrict the responsible official and deny the official access to useful comments. Since analysis of comments may continue for quite some time after the comment period, these respondents felt there should be the option for considering substantive comments that arrive a few days late.

Response. In response to comments received, § 215.6(c)(2) of the final rule has been changed to provide that "written comments may not be considered unless they are postmarked or facsimile imprinted by the close of business on the 30th day following publication of the notice." For oral comments, however, the rule retains the receipt date. This change provides the Responsible Official some discretion to consider later-arriving written and oral comments. If the comments are substantive and may help the Responsible Official's analysis or assist in decisionmaking, such comments should be available for consideration.

An additional paragraph has been added at § 215.6(c)(1) which requires the Responsible Official to clearly note the date of receipt of comments. All comments, even those postmarked after the close of the comment period, should be kept as part of the project file. As provided in § 215.6(c)(2) timely comments must be considered prior to making a final decision on the project.

The proposed rule required addressing comments in the decision document (§ 215.24(b)(1)). The final rule adds paragraph (d) to § 215.6 which

requires the Responsible Official to address comments in an appendix to the EA or, for an action to be categorically excluded, in the project file. This change allows the Responsible Official to keep the decision document brief, as intended in NEPA (40 CFR 1500.4), and also allows a less formal response.

Proposed § 215.22. This section is redesignated as § 215.7 *Decisions subject to appeal* in the final rule. Only minor editorial changes were made.

Proposed § 215.23. This section is redesignated as § 215.8 *Decisions not subject to appeal* of the final rule. In response to concerns about the emergency exemption, the provision exempting emergencies from appeal has been deleted in conformance with the changes made and previously discussed under § 215.4 *Actions subject to notice and comment*.

Proposed § 215.24. This section is 215.9 *Notice of Decision Documents* in the final rule. The Department has not adopted the requirement that requests for documents be made in writing. Although the Act calls for written requests, it has been the practice of the Forest Service to accept oral requests for documents. The Department believes that this is an appropriate policy that should be continued. Also, the final rule provides that documents will be sent to those who have expressed interest at any time during the planning of the specific project, not just during the comment period required under this rule. The Department believes that all those who have participated in the planning should be informed of the final outcome.

The Act states that "a designated Forest Service employee shall offer to meet with each individual who files an appeal * * * and attempt to dispose of the appeal." The proposed rule required listing the informal meeting date in the decision document and the decision announcement. This requirement has not been adopted because such a formal notice did not meet the intent of the Act. The communication will now be informal and will be made directly with the appellant by the Responsible Official after receiving the appeal.

Finally the entire paragraph (b) of proposed 215.24 on decision document content has not been included in the final rule, since it duplicated administrative requirements already issued through Environmental Procedures Handbook (FSH 1909.15). As previously noted, the requirement for addressing comments in the decision document has been changed in § 215.6 *Comments* to provide that they will be addressed in an appendix to the EA or in a project file.

Proposed § 215.25. This is § 215.10 *Implementation of decisions* in the final rule. Paragraph (a) of this section of the final rule was rewritten to stay implementation of all decisions subject to appeal until 5 business days after the end of the appeal filing period if there is no appeal. This change is needed to ensure a reasonable time for an appeal with a timely postmark to be received through the mail.

Although implementation of emergency actions may still be immediate, the proposed provision exempting emergencies from appeal has been rewritten to reflect that exemptions for emergencies apply only to stays of implementation and not to appeal (§ 215.10(d)). The exemption from stay can be granted only by the Chief. Paragraph (d)(1)(i)-(iv) defines emergency and cites examples. A review by the Department indicates that exemptions are needed to allow activities to occur in response to unexpected, serious occurrences or situations urgently requiring prompt action. The examples of an emergency given in § 215.10 are not intended to be all-inclusive in recognition that the Chief needs discretion to determine when an emergency exists. Paragraph (d)(2) of this section of the final rule requires the Responsible Official to notify the public that the agency intends to handle the action as an emergency as part of its notice of the proposed action. Additionally, examples of how the Forest Service may respond to emergency situations has been added to section 215.10(d)(2).

Proposed § 215.26(a)(2). This section is § 215.11 *Who may participate in appeals* in the final rule. The proposed rule provided that any person who, or non-federal organization that, provided comment or otherwise expressed interest in the specific proposal prior to the close of the comment period could file an appeal. For proposed actions subject to § 215.3, the proposal provided that persons or organizations who could appeal must have provided comment or otherwise expressed their interest in the specific proposal prior to the close of the comment period.

The lack of definition in 215.26(a)(2) in the proposed rule for the words "otherwise expressed interest" was an issue for many respondents. In general, supporters of the proposed rule want the "expressed interest" to be in writing. [The Act, Sec. 322(c), states "... written or oral comments or by otherwise notifying * * *"] Some of the same respondents also stated that appeal issues should be limited to those specific comments that appellants addressed during the comment period.

A small number of people suggested that bonds should be posted by those who file appeals. Some reviewers suggested that appellants should be U.S. citizens over 18 years of age. A very small group of respondents believed that non-local persons or organizations should be denied appeal rights. These respondents felt they were being held "hostage" by people living far away with no knowledge of the area. Other respondents believed that no prior expression of interest should be necessary in order to have standing to appeal.

Response. In the colloquy on Forest Service appeals during Senate consideration of the Act, it is apparent that Congress expects the Forest Service to clearly define a process by which "standing" requirements are met. One Senator stated "I feel that it is imperative that as the Forest Service implements the appeal provision in this legislation, they must clearly define a process by which the public comments that are received, in whatever form, are clearly documented. If there is ever a question of standing, I feel the burden of proof should be on the Forest Service to prove that an individual does not have standing rather than the appellant having to prove that he or she is eligible to file an appeal."

Section 322(c) of the Act makes clear that a person who has submitted written or oral comments or otherwise notified the Forest Service of an interest in the proposed action during the public comment process may appeal a decision. Therefore, it is not in keeping with the Act to restrict the right of appeal only to those who have submitted written comments, or to those who live in the "local" area; or on the other hand, to allow anyone to appeal regardless of whether they have previously expressed interest.

The final rule at § 215.11(a) now states that an appeal of decisions pursuant to this part may be filed by persons who, or any non-Federal organization or entity that, submitted written comment in response to an environmental assessment or letter describing the action, or provided comment or otherwise expressed interest in a specific proposal at any time prior to the close of the comment period specified in § 215.6. Section 215.6 sets the requirements for information to be provided by persons submitting comments.

As previously noted in the discussion of definitions, the term "intervenor" has been replaced in the final rule with the term "interested parties" to better reflect the informal nature of the appeal process and of the relationship between

those who appeal and those who wish to comment on an appeal. Under § 215.13(e), interested parties may participate in the appeal process by sending written comments to the Appeal Reviewing Officer no later than 15 days after the close of the appeal filing period and providing a copy to appellant. They may also participate in the informal disposition meeting(s) as provided in 215.13(f)(1). There are no longer any "standing" requirements for "interested parties."

The proposed rule stated that Federal agencies could not participate as appellants, but it was unclear whether Federal agencies could participate as intervenors. The final rule 215.11(c) makes clear that federal agencies cannot participate as either appellants or interested parties.

Proposed § 215.27. This is § 215.12 in the final rule. The final rule requires the appeal to be filed with the Appeal Deciding Officer. In addition, the table has been corrected to make the Regional Forester the Appeal Deciding Officer for both District Ranger and Forest Supervisor decisions.

Proposed § 215.28. This is § 215.13 *Appeal time periods and process* in the final rule. Also, as noted in the discussion of proposed § 215.6, extensive comments were received on evidence of timely filing of appeals. Those respondents who wanted to eliminate any delay in the administrative review process and subsequent implementation of the Responsible Official's decision favored the proposed provision that an appeal should be received, rather than postmarked by the closing date.

Response. In response to comments received, the final rule, at § 215.13(c), adopts a postmark or facsimile date imprint as evidence of timely filing of appeal. Requiring documents to be received by the end of the appeal period was intended to allow the maximum amount of time (15 days) to set up an informal meeting to attempt to resolve the appeal. Section 322 of the Act states that this meeting shall take place no later than 15 days after the closing date for filing an appeal, not after receipt of the appeal.

In the past, the postmark has been used (or time and date on a facsimile) as evidence of timely filing. The final rule reinstates that practice.

However, this change may restrict the time available for scheduling an informal disposition meeting and may reduce the time available for the Appeal Reviewing Officer's review and recommendation and the Appeal Deciding Officer's decision on the appeal. It is now likely that the optional

15-day extension period contained in § 215.34(c) will be used in almost every case. To reflect this, the appeal decision due date in § 215.13(h)(3) has been extended to 45 days following the end of the appeal filing period (30 days plus the 15-day extension). However, to assure timely decisions, § 215.13(d) has been included to prevent any further extensions of time.

It should be noted that the Responsible Official need not wait until the end of the appeal period to schedule an informal disposition meeting with the appellant. That contact may be made as soon as possible after the appeal is received.

Paragraph (e) requires any interested party to submit comments to the appeal reviewing officer within 15 days after the close of the appeal filing period and to provide a copy to the appellants at the same time. This provision was added, because there is no good way to quickly determine who wants to submit comments on an appeal as an interested party, and since the timeline for completing the appeal process under this statute is very short, it will be up to interested parties themselves to contact the Appeal Deciding Officer to see if an appeal has been filed, ask for the name and address of the Appeal Reviewing Officer and of the appellants, and to submit their comments on time. Although this puts a responsibility on the interested party, this is a reasonable approach, since the alternative is to burden the Forest Service with the impossible task of identifying and contacting all interested parties to apprise them of each appeal.

Paragraph (f)(1) of this section has been changed to provide that interested parties may also participate in the informal disposition meeting and can obtain the location, date and time for the meeting from the Responsible Official.

Paragraphs (f)(1), (2), and (3) give more specific instructions on the timeframes for appeal task accomplishment. The final rule requires the Responsible Official to transmit the decision documentation and records of informal meetings to the Reviewing Officer within 15 days of the close of the appeal filing period. A requirement was added that the Appeal Reviewing Officer must send the recommendation to the Appeal Deciding Officer within 30 days of the end of the appeal filing period. The timeframe for the Appeal Deciding Officer to issue a decision on the appeal was changed to 45 days after the end of the appeal filing period.

Paragraph (g)(1) through (3) of this section of the proposed rule were either not included in the final rule because

they are unnecessary steps in the process or were incorporated into paragraphs (f)(1) through (3).

Proposed § 215.29. This is § 215.14 *Content of an appeal* in the final rule. Since the informal meeting is no longer announced in the decision document, paragraph (b)(5) (requiring the appellants to indicate whether they will attend the informal meeting) was not retained in the final rule.

Proposed § 215.30. This is § 215.15 *Dismissal of appeal without review* in the final rule. Wording was added to paragraph (a)(5) to allow dismissal of an appeal if the appellant did not express an interest in the specific proposal at any time prior to close of the comment period. This makes it clear that appellants need only to have submitted comments at some time during the planning of the specific project and do not necessarily have to submit comments during the comment period specified in this rule.

Proposed § 215.31. These provisions on "intervention" were incorporated into § 215.11 "Who may participate in appeals" of the final rule under the topic heading *Comments from interested parties*.

Proposed § 215.32. This is § 215.16 *Informal disposition* in the final rule. The proposed rule, in accordance with the Act, provided a 15-day period following the close of the appeal period during which the Responsible Official, or designated representative, was to meet with an appellant to attempt to resolve the appeal.

Some people were concerned that the 15-day limit in the Act and regulation was too short to allow meaningful dialogue and negotiation to take place. Other concerns dealt with the requirement that the date and place of the meeting must be determined at the time of decision and be announced in the decision document. Therefore, the appellant(s) might be unable to attend the meeting. Some people suggested arranging the date and place of the meeting after consulting with the appellant. Also of concern was the provision in the Act that the informal disposition meeting be held in the vicinity of the lands affected by the decision. It was felt that the expense and time required to travel long distances to the place of the meeting might preclude some appellants from participating in the informal disposition process. One person suggested appellants should be reimbursed for expenses or time away from work. Others felt the meeting should not be optional; that appellants should be required to meet with the Forest Service

to work out an informal disposition of the appeal.

Response. The Act states: "A designated employee of the Forest Service shall offer to meet with each individual who files an appeal * * * and attempt to dispose of the appeal. Each meeting * * * shall take place not later than 15 days after the closing date for filing an appeal; and at a location designated by the Chief of the Forest Service that is in the vicinity of the lands affected by the decision."

Extending the 15-day time period and requiring appellants to attend were determined by the Department not to be in keeping with the wording of the Act. This short time period emphasizes the importance of being involved early in the planning process. It was not the intent of the Act to encourage members of the public to wait until the last minute to express concerns about projects.

The Act clearly put the responsibility for offering to meet on the agency, not on the appellant. The proposed rule addressed this by pre-scheduling the informal disposition meeting and including the date, time, and location in the decision documentation and the public notice of decision published in the designated newspaper. In response to public concerns, the final rule at § 215.16(b) now requires the Responsible Official to get in touch with the appellant(s) and offer to meet and discuss resolution of the issues raised in the appeal as soon as possible after the appeal has been filed.

The Department views meetings "on the ground" as the best way to resolve concerns raised by the public. However, the difficulty of this requirement is also realized. The final rule § 215.16(b) states that the location of the meeting shall be in the vicinity of the lands affected by the decision but makes allowances for moving the location at the discretion of the Responsible Official. Final rule § 215.16(c) allows for telephone conferences and video conferences if an in-person meeting cannot take place.

There is still concern that using the postmark as evidence of timely filing of an appeal (an appeal may arrive past the end of the appeal period and still be timely by postmark) may cut into the 15-day period for the informal resolution meeting. Given the statutory provisions, the Department sees no way to resolve this problem.

Paragraph (a) now requires the Responsible Official to get in touch with the appellant promptly after the appeal is filed to offer to meet in an effort to resolve the appeal informally. This complies with the intent of the Act and replaces the notice of informal meeting

listed in the decision document and the decision announcement in the newspaper.

Paragraph (b) was added to specify that the meeting shall be held in the vicinity of the lands affected by the decision.

Paragraph (c) was added to indicate that although in-person meetings are preferred, other types of communications may be used to confer and to accommodate schedules and travel distances.

Paragraph (d) was reworded to require the appellant to write a letter to the Appeal Deciding Officer withdrawing the appeal. This more specifically indicates the type of notice that is required from the appellant withdrawing an appeal. A written timely withdrawal more formally and clearly documents the agreement to withdraw an appeal.

Paragraph (e) has been reworded to require the Responsible Official to notify the Appeal Reviewing Officer in writing if the appeal is not resolved in the informal meeting, and eliminates the requirement from this section that intervenor comments be sent as part of the appeal record. Inclusion of the interested party comments in the appeal record is now covered under 215.2.

Proposed § 215.33. This is § 215.17 *Formal disposition* in the final rule. The proposed rule stated that if an Appeal Deciding Officer did not issue a decision within 45 days, "the decision being appealed stands as the final agency decision."

Some respondents noted a lack of agency accountability associated with this provision. There would be no incentive for the Forest Service to decide appeals within the 45-day limit, since by "not deciding," the original project decision would become final. It was noted that the agency could virtually ignore appeals. A person's only recourse would then be litigation.

Many people noted that a finite period for deciding appeals was necessary because delays associated with appeals result in uncertainty for businesses and communities dependent upon the national forests and waste money.

Response. Although the Act contains this requirement, it is entirely within Forest Service jurisdiction to require a decision on the appeal within the prescribed time period. The final rule 215.17(b) therefore states the Appeal Deciding Officer shall issue a notification to the appellants concerning the disposition of their appeal within the allotted time. The Department believes appellants deserve a response from the Appeal Deciding Officer and

that the Forest Service should not, in essence, ignore concerns raised by the public.

Paragraph (a) requires the Appeal Deciding Officer to issue an appeal decision not later than 45 days after the end of the appeal filing period.

Proposed paragraph (b)(2) has not been incorporated because the final rule requires the Appeal Deciding Officer to issue a written notification concerning disposition of an appeal. This was in response to public concern about use of the (pocket approval) provision of the Act to "rubber stamp" a responsible official's decision. The notification requirement will avoid the appearance of ignoring an appeal and promote accountability.

Proposed § 215.34. This is § 215.18 *Appeal deciding officer authority* in the final rule. Paragraph (c) *Extension of time* was not incorporated in the final rule because the appeal review period has been already set at 45 days and no extensions are possible.

Paragraph (e) *Appeal decisions* was not included in this section of the final rule because it is already covered in § 215.13(h)(3).

Proposed § 215.35. This is § 215.19 *Appeal reviewing officer authority* in the final rule. Public comment expressed concern that too many Forest Service officials were involved in the formal disposition process; that, in addition, the Appeal Reviewing Officers might be Responsible Officials on other decisions, thus creating the perception of bias during the review. Some respondent's were concerned about the potential for bias if a forest supervisor could review a district ranger's decision on the same forest.

Support was expressed in a significant number of comments for confining review of decisions to one level of the Forest Service. There also were a number of comments in favor of retaining the current (two level) process. Suggestions also were made to establish a review board, which was perceived as being more objective in reviewing decisions.

Response. In response to the concern about the appearance of bias by a person being a line officer of equal level, the final rule at section § 215.19(a) designates the Appeal Reviewing Officer as follows: an agency official at the regional level designated by the Chief for appeals of district ranger and forest supervisor decisions; and an agency official at the Washington Office level designated by the Chief for appeals of regional forester decisions. Under the final rule, the Appeal Reviewing Officer may not have participated in the initial decision and will not be responsible for

implementing the initial decision after the appeal is decided.

Paragraph (b) *Scope of review* was rewritten to clarify that the Appeal Reviewing Officer's review is to focus on decision documentation and the appeal record. The appeal record is defined in § 215.2. The reference to the Appeal Reviewing Officer seeking additional information from any source was not adopted because the decision on the appeal should be based on the same information used in the Responsible Official's decision.

Paragraphs (c) *Review period* and (d) *Appeal disposition recommendation* have been included in the final rule at § 215.13(f)(2). A new paragraph (c) has been added in § 215.19 to clarify that the Appeal Reviewing Officer's review of decisions shall focus on decision documentation developed by the Responsible Official in reaching a decision, issues raised in the appeal, and comments submitted by interested parties.

Proposed 215.36. This is § 215.20 *Policy in event of judicial proceedings* in the final rule. This section was edited to acknowledge that the Department may waive exhaustion of administrative remedies as an argument in court actions.

Proposed 215.37. This is § 215.21 *Applicability and effective date* in the final rule. No change was made in this section.

Summary

The Department is committed to fostering a public involvement climate that allows for the open expression of ideas and encourages the public to join with the Agency in identifying and analyzing natural resource management options which result in balanced, multiple-use management of the national forest. In examining the efficiency of the current appeal process, the question is not whether the public should be involved in Forest Service planning and decisionmaking, but when and how that involvement should occur. The Act allows for expanded opportunities for public involvement in Forest Service decisionmaking. With section 322 of the Act, Congress recognized that critical decisions irretrievably committing resources generally occur at the project level of decisionmaking, a view long held by both the Department and the courts, as evidenced in decisions rendered on appeals and in court decisions on challenges to forest plans.

The Department has concluded that the public interest is best served by mutual efforts to resolve differences during the decisionmaking process,

rather than after a decision has been made. Therefore, in implementing this rule, the Department hopes to expand opportunities for pre-decisional involvement of the public in agency decisionmaking by establishing procedures to require public notice of and opportunity to comment on proposed actions. The procedures for the appeal of project and activity decisions which implement forest plans will allow for expeditious review of public concerns.

Adding a pre-decisional public notice and comment opportunity will help reduce the uncertainty that results from post-decisional appeals for communities dependent upon Forest Service goods and services, and will allow for greater stability in these dependent communities.

Regulatory Impact

This final rule has been reviewed under USDA procedures and Executive Order 12866 governing "Regulatory Planning and Review." The rule will not substantially increase prices or costs for consumers, industry, or State or local governments, nor adversely affect competition, employment, investment productivity, innovation, or the ability of United States-based enterprises to compete in foreign markets. To the contrary, adoption of this rule is intended to substantially reduce the disruption and delay arising from the current appeal rule and, thereby, provide a greater assurance that the Forest Service can carry out programs authorized and funded by Congress. Moreover, this rule has been considered in light of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.), and it has been determined that this section will not have a significant adverse economic impact on a substantial number of small entities as defined by that Act.

Executive Order No. 12278

Executive order No. 12278 implements the Civil Justice Reform Act. The General Counsel has certified to the Office of Management and Budget that the regulations in this rule meet the applicable standards provided in sections 2(a) and 2(b) of Executive Order No. 12278. By focusing on pre-decisional notice and comment, this rule is fully consistent with the President's emphasis in implementing the Civil Justice Reform Act to use early and alternative methods to resolve conflicts and thereby reduce the potential of litigation.

Environmental Impact

This final rule falls within a category of actions (Rules, regulations or policies

to establish Service-wide administrative procedures, program processes, or instructions) which normally does not individually or cumulatively have a significant effect on the quality of the human environment and, therefore, may be categorically excluded from documentation in an environmental assessment or environmental impact statement unless scoping indicates extraordinary circumstances exist (Forest Service Handbook 1909.15, section 31.1b, paragraph 2; 57 FR 43180, September 18, 1992). Scoping of the proposed rule indicated that there were no extraordinary circumstances involved. Therefore, this final rule is excluded from documentation in an environmental assessment or environmental impact statement.

Controlling Paperwork Burdens on the Public

This rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 and thereby imposes no paperwork burden on the public.

List of Subjects in 36 CFR Parts 215 and 217

Administrative practice and procedure, National forests.

Accordingly, 36 CFR chapter II is amended as set forth below.

Add a new part 215 to read as follows:

PART 215—NOTICE, COMMENT, AND APPEAL PROCEDURES FOR NATIONAL FOREST SYSTEM PROJECTS AND ACTIVITIES

Sec.

- 215.1 Purpose and scope.
- 215.2 Definitions.
- 215.3 Proposes actions subject to notice and comment.
- 215.4 Actions not subject to notice and comment.
- 215.5 Notice for public comment on proposed actions.
- 215.6 Response to comments received on proposed actions.
- 215.7 Decisions subject to appeal.
- 215.8 Decisions not subject to appeal.
- 215.9 Notice of decisions.
- 215.10 Implementation of decisions.
- 215.11 Who may participate in appeals.
- 215.12 Where to file appeals.
- 215.13 Appeal time periods and process.
- 215.14 Content of an appeal.
- 215.15 Dismissal of appeal without review.
- 215.16 Informal disposition.
- 215.17 Formal disposition.
- 215.18 Appeal deciding officer authority.
- 215.19 Appeal reviewing officer authority.
- 215.20 Policy in event of judicial proceedings.
- 215.21 Applicability and effective date.

Authority: 16 U.S.C. 472, 551; sec. 322, Pub. L. 102-381, 106 Stat. 1419 (16 U.S.C. 1612 note).

§ 215.1 Purpose and scope.

(a) *Purpose.* The rules of this part have two purposes. First, this part establishes a process by which persons or organizations may receive notice and be provided opportunity to comment on proposed actions implementing national forest land and resource management plans prior to a final decision by the responsible official. This includes notice of and opportunity to comment on nonsignificant amendments of land and resource management plans that are made in conjunction with those proposed actions. Second, this part provides for prompt administrative review of project and activities implementing forest plans and establishes who may appeal decisions on planned actions, the kind of decisions that may be appealed, the responsibilities of the participants in an appeal, and the procedures that apply.

(b) *Scope.* The process established in this part constitutes the final administrative opportunity for the public to influence National Forest System project decisionmaking prior to implementation. The rules of this part complement, but do not replace, numerous other opportunities to participate in and influence agency decisionmaking provided pursuant to the National Environmental Policy Act of 1969, the National Forest Management Act, and the implementing regulations and procedures in 40 CFR parts 1500-1508 and 36 CFR parts 216 and 219, Forest Service Manual Chapters 1920 and 1950, and Forest Service Handbooks 1909.12 and 1909.15.

§ 215.2 Definitions.

For the purpose of this part—
Appeal is the written document filed with an Appeal Deciding Officer by one who objects to a decision covered by this part.

Appeal Deciding Officer is the Forest Service line officer having the delegated authority and responsible to render a decision on an appeal filed under this part.

Appeal Period is the 45 calendar-day period during which an appeal may be filed with the Appeal Deciding Officer.

Appeal Record is the information assembled and/or created during the course of an appeal and upon which review of an appeal is conducted. It consists of the decision documentation, the appeal, the Responsible Official's documentation of the informal disposition meeting, the public notice of

decision document, and written comments submitted by interested parties.

Appeal Reviewing Officer is an agency official who reviews an appeal and makes a written recommendation to the Appeal Deciding Officer on the disposition of the appeal.

Appellant is a person or organization filing an appeal under this part.

Categorical Exclusion refers to a category of actions which do not individually or cumulatively have a significant effect on the human environment and for which neither an environmental impact statement (EIS) nor an environmental assessment (EA) is required (40 CFR 1508.4; Forest Service Handbook 1909.15, Chapter 30).

Comment Period is the 30 calendar day period, following publication of the notice for public comment, available to interested persons to provide comments to a Responsible Official on a proposed action subject to this part.

Decision Document is the document that records the decisions for actions implementing land and resource management plans. (See also, Record of Decision, Decision Notice, and Decision Memo.)

Decision documentation refers to the decision document and all relevant environmental and other analysis documentation and records on which the Responsible Official based a decision that is at issue under an appeal filed pursuant to this part. Decision documentation may include, but is not limited to, a project or case file, Record of Decision, Decision Notice, Decision Memo, environmental assessment, finding of no significant impact, draft and final environmental impact statement, land and resource management plan, regional guide, and documents incorporated by reference in any of the preceding documents.

Decision Memo is a concise written record of a Responsible Official's decision to implement actions that have been categorically excluded from documentation in an environmental impact statement or environmental assessment (40 CFR 1508.4; Forest Service Handbook 1909.15, Chapter 30).

Decision Notice is a concise written record of a Responsible Official's decision based on an environmental assessment and a finding of no significant impact. (40 CFR 1508.9; Forest Service Handbook 1909.15, Chapter 40).

Environmental Assessment is a concise public document that provides sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact (40 CFR

1508.9; Forest Service Handbook (FSH), 1909.15, Chapter 40).

Environmental Impact Statement is a detailed written statement as required by section 102(2)(C) of the National Environmental Policy Act of 1969 (40 CFR 1508.11; FSH 1909.15, Chapter 20).

Finding of No Significant Impact (FONSI) is a document prepared by a federal agency presenting the reasons why an action, not otherwise excluded, will not have a significant effect on the human environment and for which an environmental impact statement, therefore, will not be prepared. It includes the environmental assessment or a summary of it and shall note any other environmental documents related to it (40 CFR 1508.13; Forest Service Handbook 1909.15, Chapter 40).

Forest Service line officer is a Forest Service official who serves in a direct line of command from the Chief and who has the delegated authority to make and execute decisions subject to this part. Specifically, for the purposes of this part, a Forest Service employee who holds one of the following offices and titles: District Ranger, Deputy Forest Supervisor, Forest Supervisor, Deputy Regional Forester, Regional Forester, Associate Deputy Chief, Deputy Chief, Associate Chief of the Forest Service, or an employee delegated the authority to act in one of these capacities.

Interested Party is a person or organization other than the appellant that provides written information to the Appeal Reviewing Officer regarding an appeal.

Proposed action is a proposal made by the Forest Service to authorize, recommend, or implement an action on National Forest System lands to meet a specific purpose and need which is subject to the notice and comment provisions of this part.

Proposed Timber Harvest Categorically Excluded from Documentation under Forest Service Handbook 1909.12, section 31.2, paragraph 4 is timber harvest which removes 250,000 board feet or less of merchantable wood products, or salvage which removes 1,000,000 board feet or less of merchantable wood products; which requires one mile or less of low standard road construction (Service level D. FSH 7709.56); and assures regeneration of harvested or salvaged areas, where required; which normally are categorically excluded from documentation in an environmental assessment or environmental impact statement; and for which a project or case file and decision memo are required (Forest Service Handbook 1909.12, sec. 31.2, para. 4).

Record of Decision is a document signed by a Responsible Official recording a decision that was preceded by preparation of an environmental impact statement (40 CFR 1505.2; Forest Service Handbook 1909.15, Chapter 20).

Responsible Official is the Forest Service line officer who has the authority and responsibility to make decisions on proposed actions subject to notice, comment and appeal under this part.

§ 215.3 Proposed actions subject to notice and comment.

The notice and comment procedures of § 215.5 apply only to the following actions:

(a) Proposed actions implementing national forest land and resource management plans (36 CFR 219.11) for which an environmental assessment is prepared.

(b) Proposed timber harvest as described in Paragraph 4, section 31.2 of Forest Service Handbook 1905.15 for which a project or case file and Decision Memo are required.

(c) Nonsignificant amendments (36 CFR part 219) to land and resource management plans that are included as part of a decision on a proposed action as specified in paragraph (a) of this section.

(d) Proposed actions on those National Forests which do not yet have approved land and resource management plans prepared pursuant to 36 CFR part 219 as follows:

(1) Proposed actions for which an environmental assessment is prepared; or

(2) Proposed timber harvest as described in Paragraph 4, section 31.2 of Forest Service Handbook 1905.15 for which a project or case file and Decision Memo are required.

(e) Proposed forestry research activities to be conducted on National Forest Systems lands for which an environmental assessment has been prepared.

§ 215.4 Actions not subject to notice and comment.

The following proposed actions are not subject to notice and comment procedures of § 215.5

(a) Actions described in a draft environmental impact statement, for which notice and comment procedures are governed by 40 CFR parts 1500-1508;

(b) Actions categorically excluded from documentation in an environmental impact statement or environmental assessment pursuant to 7 CFR 1b.3 or FSH 1909.15, sections 31.1 and 31.2, except timber harvest actions as specified in § 215.3(b) and (d)(2).

(c) Any action or policy not subject to the provisions of the National Environmental Policy Act and the implementing regulations at 40 CFR parts 1500-1508;

(d) Rules promulgated in accordance with the Administrative Procedure Act (5 U.S.C. 551 et seq.) or policies and procedures issued in Forest Service Manuals and Handbooks (36 CFR parts 200, 216);

(e) A nonsignificant amendment to a land and resource management plan which is made separately from a proposed action specified in § 215.3(c) and which, therefore, is subject to appeal under part 217 of this chapter.

§ 215.5 Notice and comment on proposed actions.

(a) *Annual notice of newspapers.* Annually, each Regional Forester shall, through notice published in the Federal Register, advise the public of the principal newspapers to be utilized for publishing notices required by this section.

(b) *Manner of giving notice.* (a) The Responsible Official shall publish notice of proposed actions as specified in § 215.3 in a newspaper of general circulation identified pursuant to the requirements of paragraph (a) of this section.

(2) The Responsible Official also shall give the public notice of the opportunity to comment on proposed actions subject to this part as follows:

(i) For proposed actions requiring an environmental assessment, the Responsible Official shall promptly mail the environmental assessment along with a letter identifying the proposed action to any person who has requested it and to persons who are known to have participated in the environmental analysis process.

(ii) For proposed timber harvest actions categorically excluded from documentation under Forest Service Handbook 1909.15, section 31.2, paragraph 4, the Responsible Official shall promptly mail a letter briefly describing the proposed to any person who has requested notice, to persons who are on a mailing list to receive notice of this type of decision, or to persons who are known to have participated in the decisionmaking process.

(c) *Content of the public notice for comment on proposed actions.* All notices provided or published pursuant to this section shall include the following:

(1) The title and brief description of the proposed action;

(2) A general description of the proposed action location;

(3) Instructions on how to obtain additional information on the proposed action;

(4) The name, title, address, and telephone number of the Responsible Official to whom comments should be addressed; and

(5) The date the comment period ends (§ 215.6(a)).

§ 215.6 Response to comments received on proposed actions.

(a) *Comment period.* The Responsible Official shall accept comments on an proposed action subject to § 215.3 for 30 days following the date of publication of the notice for public comment. Both oral and written comments shall be accepted. The 30-day period for comment begins on the first day after publication of notice. Saturdays, Sundays, and Federal holidays are included in computing all time periods in this section; however, when the comment period ends on a Saturday, Sunday, or Federal holiday, the comment period shall be extended to the close of business of the next Federal working day.

(b) *Submission.* Persons expressing an interest or submitting comments to the Responsible Official in response to a notice published or provided pursuant to § 215.5 shall provide the following information, which will become a matter of public record:

(1) Name, address, and (if possible) telephone number;

(2) Title of the document(s) on which comment is being submitted; and

(3) Specific facts or comments along with supporting reasons that the person believes the Responsible Official should consider in reaching a decision.

(c) *Timeliness.* It is the responsibility of persons providing comments to submit them by the close of the comment period.

(1) When comments are received, the Responsible Official shall clearly identify the date of receipt.

(2) The Responsible Official must consider all written comments postmarked or facsimile imprinted by the close of business on the 30th day following publication of the notice (§ 215.5) and all oral comments received by the close of business on the 30th day following publication of the notice.

(d) The Responsible Official shall address comments received from the public during the comment period in an appendix to the environmental assessment. For proposed timber harvest actions to be categorically excluded from documentation under Forest Service Handbook 1909.15, section 31.2, paragraph 4, public comments and

responses to them shall be placed in the project file.

(e) Notes of oral comments received in response to a notice for public comment pursuant to § 215.5 shall be placed in the files and addressed pursuant to paragraph (d) of this section.

§ 215.7 Decisions subject to appeal.

Only the following decisions are subject to appeal under this part:

(a) Project and activity decisions documented in a Record of Decision or Decision Notice, including those which, as a part of the project approval decision, contain a nonsignificant amendment to a National Forest Land and Resource Management Plan (36 CFR 219.10).

(b) Timber harvest project and activity decisions as described in paragraph 4, Section 31.2 of Forest Service Handbook 1909.15 which are documented in a decision memo.

§ 215.8 Decisions not subject to appeal.

(a) The following decisions are not subject to appeal under this part:

(1) Project or activity decisions included in a Record of Decision for significant amendment, revision, or approval of a land and resource management plan, appeal of which is governed by 36 CFR part 217;

(2) Preliminary findings made during planning and/or analysis processes. Such findings are appealable only upon issuance of a decision document;

(3) Actions for which notice and opportunity to comment have been published and on which no expression of interest has been received during the comment period (§ 215.6), and on which the Responsible Official's decision does not modify the proposed action; and

(4) Decisions for actions that have been categorically excluded from documentation in an environmental assessment or environmental impact statement in FSH 1909.15, Section 31.1 and 31.2, except as noted in § 215.7(b).

(b) In addition to decisions excluded from appeal by paragraph (a) of this section, the Appeal Deciding Officer shall dismiss any appeal filed on subsequent implementing actions that result from the initial project decision subject to appeal under § 215.7. For example, an initial decision to offer a timber sale is appealable under this part; subsequent implementing actions to advertise or award that sales are not appealable under this part.

(c) Decisions solely affecting the business relationship between the Forest Service and holders of written instruments regarding occupancy and use of National Forest System lands can be appealed by permit holders under

either 36 CFR part 251, subpart C, or this part, but cannot be appealed under both regulations.

§ 215.9 Notice of decisions.

(a) *Publication of public notice.* The Responsible Official shall publish a notice of any decision which is subject to notice and comment under § 215.3 in a newspaper of general circulation identified pursuant to the requirements of § 215.5(a).

(b) *Publication of notice of a decision.* A notice of a decision published pursuant to this section shall:

(1) Include the decision title and a concise description of the action(s) to be taken, the name and title of the Responsible Official, and instructions for obtaining a copy of the decision document;

(2) Except for decisions on which no expression of interest was received during the comment period § 215.8(4), state that the decision is subject to appeal pursuant to this part and include the following:

(i) State the name and address of the Appeal Deciding Officer with whom an appeal should be filed;

(ii) Specify that an appeal must be postmarked and submitted to the Appeal Deciding Officer within 45 days of the date of publication in accordance with § 215.13;

(3) For those decisions on which no comment was received, state that the decision is not subject to appeal pursuant to § 215.8(a)(4).

(c) *Mailing decision documents.* The Responsible Official shall promptly mail the decision document to those who request the specific document and to those who submitted comments on the proposed action either before or during the comment period provided pursuant to § 215.8.

§ 215.10 Implementation of decisions.

(a) If no appeal is filed, implementation of decisions subject to appeal pursuant to this part may occur on, but not before, 5 business days from the close of the appeal filing period.

(b) If an appeal is filed, implementation may not occur for 15 days following the date of appeal disposition. In the event of multiple appeals of the same decision, the date of the disposition of the last appeal controls the implementation date.

(c) If a project is not appealable because, pursuant to § 215.8(a)(4), no expression of interest has been received and there is no change from the proposed action, implementation may occur immediately upon publication of the notice of the decision as provided in § 215.9.

(d) A project decision is not subject to a stay if the Chief of the Forest Service determines that an emergency situation exists with respect to the decision in accordance with the following provisions of this paragraph:

(1) An emergency, as defined here, is an unexpected event, or a serious occurrence or a situation requiring urgent action. Examples of an emergency include, but are not limited to, the following:

(i) Vegetation loss which presents an immediate threat of flooding or landslides.

(ii) Hazardous or unsafe situations as a result of wildfire or other circumstances.

(iii) Damage to water quality caused by siltation due to fire or flooding.

(iv) Potential loss of fish and wildlife habitat due to windstorms and blowdowns.

(v) Sudden outbreaks of forest pests and diseases.

(2) The Responsible Official shall notify the public that the Forest Service intends to handle this project as an emergency in the public notice on proposed actions as provided in § 215.5(c)(1). Actions responding to emergency situations may be accomplished with force account (Forest Service crews), service contracts or timber sale contracts.

§ 215.11 Who may participate in appeals.

(a) Except as provided for in paragraph (c) of this section, an appeal pursuant to this part may be filed by any person who, or any non-Federal organization or entity that has met either of the following criteria:

(1) Submitted written comment in response to a project draft Environmental Impact Statement; or

(2) Provided comment or otherwise expressed interest in a particular proposed action by the close of the comment period specified in § 215.8.

(b) Persons interested in or potentially affected by an appeal may participate as an interested party, as provided in § 215.13(e).

(c) Forest Service employees and Federal agencies may not participate as appellants or interested parties.

§ 215.12 Where to file appeals.

The Appeal Deciding Officer with whom appeals must be filed are as follows:

If the responsible official who made the decision is:	Then the appeal deciding officer is:
Regional Forester	Chief of the Forest Service.

If the responsible official who made the decision is:	Then the appeal deciding officer is:
Forest Supervisor or District Ranger	Regional Forester, Do.

§ 215.13 Appeal time periods and process.

(a) *Filing procedures.* To appeal a decision under this part, a person must submit a written appeal to the Appeal Deciding Officer within the 45 day appeal filing period specified in the public notice published pursuant to § 215.9.

(b) *Computation of time periods.* (1) The day after the publication of the public notice published pursuant to § 215.9 is the first day of the appeal filing period.

(2) All time periods in this section are to be computed using calendar days. Saturdays, Sundays, and Federal holidays are included in computing the time period for filing an appeal. However, when the filing period would expire on a Saturday, Sunday, or Federal holiday, the filing time is extended to the end of the next Federal working day.

(c) *Evidence of timely filing.* The appellant is responsible for submitting an appeal on or before the last day of the appeal filing period. Where there is a question about timelines of an appeal, the U.S. Postal Service postmark on a mailed appeal or the time and date imprint on a facsimile appeal will be used to determine timeliness.

(d) *Time extensions.* Time extensions are not permitted.

(e) *Interested party comments.* Interested parties must submit written comments to the Appeal Reviewing Officer within 15 days after close of the appeal filing period and are encouraged to provide a copy to the appellants at the same time. An interested party can obtain the address of the Appeal Reviewing Officer and appellants by contacting the Appeal Deciding Officer.

(f) *Time period for formal disposition.* Unless an appeal is resolved through the informal disposition process provided for in § 215.16, the following timeframe and process shall apply:

(1) *Transmittal of decision documentation.* Within 15 days of the close of the appeal filing period, the Responsible Official shall transmit the appeal record to the Appeal Reviewing Officer.

(2) *Review recommendation.* Within 30 days of the close of the appeal filing period, the Appeal Reviewing Officer shall review the appeal record and forward it to the Appeal Deciding Officer with a written recommendation on the disposition of the appeal(s). The

Appeal Reviewing Officer's recommendation shall be released upon issuance of an appeal decision.

(3) *Appeal decision.* Within 45 days following the end of the appeal filing period, the Appeal Deciding Officer shall issue a written decision or otherwise give notice to appellant(s) concerning the disposition of the appeal. The decision or notice shall briefly explain why the Responsible Official's original decision was affirmed or reversed, in whole or in part.

§ 215.14 Content of an appeal.

(a) It is the appellant's responsibility to provide sufficient written evidence and rationale to show why the Responsible Official's decision should be remanded or reversed.

(b) An appeal submitted to the Appeal Deciding Officer becomes a part of the appeal record. An appeal must meet the following requirements:

(1) State that the document is an appeal filed pursuant to 36 CFR part 215;

(2) List the name and address of the appellant and, if possible, a telephone number;

(3) Identify the decision document by title and subject, date of the decision, and name and title of the Responsible Official;

(4) Identify the specific change(s) in the decision that the appellant seeks or portion of the decision to which the appellant objects;

(5) State how the Responsible Official's decision fails to consider comments previously provided, either before or during the comment period specified in § 215.6 and, if applicable, how the appellant believes the decision violates law, regulation, or policy.

§ 215.15 Dismissal of appeal without review.

(a) An Appeal Deciding Officer shall dismiss an appeal without review when:

(1) The appeal is not postmarked or the facsimile is not date imprinted within the 45-day appeal filing period in accordance with § 215.13;

(2) The requested relief or change cannot be granted under law, fact, or regulation;

(3) The decision at issue is being appealed by the appellant under another administrative proceeding;

(4) The decision is excluded from appeal pursuant to § 215.8;

(5) The appellant did not express an interest in the specific proposal at any time prior to the close of the comment period specified in § 215.6;

(6) The Responsible Official has withdrawn the decision being appealed; or

(7) The appellant has filed for Federal judicial review of the decision and the Chief has waived the argument in § 215.20.

(b) The Appeal Deciding Officer shall give written notice to the appellant, interested parties, and Responsible Official that an appeal is dismissed and state the reasons for dismissal.

§ 215.16 Informal disposition.

(a) *Offer to meet.* When a decision is appealed under this part, the Responsible Official must contact the appellant(s) and offer to meet and discuss resolution of the issues raised in the appeal. This contact shall be made as soon as practicable after an appeal has been filed.

(b) *Time and location of meeting.* If one or more appellants agree to meet, the meeting(s) must take place not later than 15 days after the closing date for filing an appeal. The location of the meeting shall be in the vicinity of the lands affected by the decision. When the District Ranger is the Responsible Official, meetings will generally be located on or near that Ranger District. When the Forest Supervisor or Regional Forester is the Responsible Official, meetings will generally take place at a location within or near the National Forest.

(c) *Type of meeting.* Generally, participants shall be physically present at informal disposition meetings. Where an appellant cannot attend a meeting in person because of schedule conflicts or travel distances, alternative types of meetings (such as telephone conferences or video conferences) may be arranged. This alternative type meeting also must take place not later than 15 days after the closing date for filing an appeal. The informal disposition meeting must be open to interested parties and the public.

(d) *Agreement on disposition.* The Responsible Official must notify the Appeal Deciding Officer of the names of meeting participants and the outcome of the informal disposition meeting.

(1) If the appellant(s) and Responsible Official reach agreement on disposition of the appeal, the Responsible Official shall so notify the Appeal Deciding Officer and the appellant shall withdraw the appeal by letter to the Appeal Deciding Officer no later than 15 days after the meeting. Upon notice from the appellant that the appeal has been withdrawn, the Appeal Deciding Officer shall notify the interested parties, Appeal Reviewing Officer, and Responsible Official of the conclusion of the appeal.

(2) If, as a result of the agreement reached at the informal disposition

meeting, new information is received or changes to the original project decision or environmental analysis are proposed, the Responsible Official must follow the procedures in the Environmental Policy and Procedures Handbook, FSH 1909.15, section 18.

(e) *Failure to reach agreement.* If the appeal is not resolved through the informal disposition meeting, the Responsible Official shall so notify the Appeal Deciding Officer in writing. The Appeal Deciding Officer shall then advise the Appeal Reviewing Officer to proceed with formal review of the appeal.

§ 215.17 Formal disposition.

(a) *Formal disposition period.* The Appeal Deciding Officer shall issue an appeal decision not later than 45 days after the end of the appeal filing period.

(b) *Appeal decision.* The Appeal Deciding Officer shall complete a review based on the appeal record as defined in § 215.2 and the Reviewing Officer's recommendation. The Appeal Deciding Officer shall issue a written appeal decision either affirming or reversing the Responsible Official's decision, in whole or in part, and may include instructions for further action. The Appeal Deciding Officer shall send a copy of the appeal decision to the appellant, interested parties, the Appeal Reviewing Officer, and the Responsible Official. If a formal decision is not issued, the Appeal Deciding Officer shall notify the appellant(s) of the disposition of their appeal.

§ 215.18 Appeal deciding officer authority.

(a) *Consolidation of appeal decisions.* In cases involving multiple appeals of a decision subject to this part, the Appeal Deciding Officer shall determine whether to issue one appeal decision or separate appeal decisions.

(b) *Procedural decisions.* The Appeal Deciding Officer shall make all procedural determinations in this part. Such determinations are not subject to further administrative review.

(c) *Appeal decisions.* The Appeal Deciding Officer's decision constitutes the final administrative determination of the Department of Agriculture.

§ 215.19 Appeal reviewing officer authority.

(a) *Identification of Appeal Reviewing Officer.* An agency official at the Regional Office level designated by the Chief is the Appeal Reviewing Officer for appeals of District Ranger and Forest Supervisor decisions. An agency official at the Washington Office level designated by the Chief is the Appeal Reviewing Officer for appeals of

Regional Forester Decisions. The Appeal Reviewing Officer shall be an officer at least at the level of the agency official who made the initial decision on the project or activity that is under appeal and has not participated in the initial decision and will not be responsible for implementing the initial decision after the appeal is decided.

(b) *Scope of review.* The Appeal Reviewing Officer's review of decisions under this part focuses on decision documentation developed by the Responsible Official in reaching the decision, issues raised in the appeal, and comments submitted by interested parties.

(c) *Consolidation of recommendations.* In cases involving multiple appeals of a decision subject to this part, the Appeal Reviewing Officer shall determine whether to issue one recommendation or separate recommendations.

§ 215.20 Policy in event of judicial proceedings.

Unless waived in a specific case, it is the position of the Department of Agriculture that any filing for Federal judicial review of a decision subject to review under this part is premature and inappropriate unless the plaintiff has first sought to invoke and exhaust the procedures available under this part.

§ 215.21 Applicability and effective date.

(a) The requirements of § 215.5 of this part to provide notice and opportunity to comment on proposed actions described in § 215.3 is effective January 3, 1994.

(b) Decisions for which notice has been given pursuant to 36 CFR 217.5 prior to January 3, 1994, remain subject to the appeal procedures of 36 CFR part 217.

PART 217—APPEAL OF REGIONAL GUIDES AND NATIONAL FOREST LAND AND RESOURCE MANAGEMENT PLANS

2. Revise the heading for part 217 to read as set out above.

3. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 551, 472.

4. Revise § 217.1 to read as follows:

§ 217.1 Purpose and scope.

(a) This part provides a process by which a person or organization interested in the management of the National Forest System may administratively appeal decisions to approve, amend, or revise a National Forest land and resource management plan or approve or amend a regional

guide prepared pursuant to 36 CFR part 219. This part establishes who may appeal such decisions, the kind of decisions that may be appealed, the responsibilities of the participants in an appeal, and the procedures that apply. This part provides a review of such decisions by an official at the next administrative level.

(2) This part complements, but does not replace, numerous opportunities to participate in and influence agency decisionmaking provided pursuant to the National Environmental Policy Act of 1969 (NEPA) and the associated implementing regulations and procedures in 40 CFR parts 1500–1508, 36 CFR parts 215, 216, and 219, Forest Service Manual Chapters 1920 and 1950, and Forest Service Handbooks 1909.12 and 1909.15.

5. Amend § 217.2 by removing the definition for "Decision Memo" and by revising the definitions for "decision document", "decision documentation", and "Forest Service line officer" to read as follows:

§ 217.2 Definitions.

Decision document means a written document that a Deciding Officer signs to execute a decision subject to review under this part. Specifically a Record of Decision or a Decision Notice.

Decision documentation refers to the decision document and all relevant environmental and other analysis documentation on which the Deciding Officer based a decision that is at issue under the rules of this part. Decision documentation includes, but is not limited to, environmental assessments, findings of no significant impact, environmental impact statements, land and resource management plans, regional guides, documents incorporated by reference in any of the preceding documents, and drafts of these documents released for public review and comment.

Forest Service line officer. The Chief of the Forest Service or a Forest Service official who serves in a direct line of command from the Chief and who has the delegated authority to make and execute decisions under this subpart. Specifically, for the purposes of this subpart, a Forest Service employee who hold one of the following offices and titles: Forest Supervisor, Deputy Forest Supervisor, Regional Forester, Deputy Regional Forester, Deputy Chief, Associate Deputy Chief, Associate Chief, or the Chief of the Forest Service.

6. Revise § 217.3 to read as follows:

§ 217.3 Decisions subject to appeal.

(a) The following decisions are subject to appeal under this part:

(1) Decisions to approve, amend, or revise a National Forest Land and Resource Management Plan including project or activity decisions for which environmental effects have been analyzed and disclosed within a final EIS and documented in a Record of Decision including approval, significant amendments, or revisions of a land and resource management plan.

(2) Decisions to approve or amend a regional guide prepared pursuant to 36 CFR part 219 and documented in a Decision Notice or Record of Decision are subject to appeal under this part, except as provided in § 217.4.

(b) Decisions as defined in paragraph (a) of this section and documented in a Decision Notice or a Record of Decision that are made by a subordinate Forest Service staff officer acting within delegated authority are considered to be decisions of the Forest Service line officer.

7. Revise § 217.4 to read as follows:

§ 217.4 Decisions not subject to appeal.

The following decisions are not subject to appeal under this part.

(a) Decisions on projects or activities implementing National Forest Land and Resource Management Plans including project decisions that include a non-significant amendment to a National Forest Land and Resource Management Plan.

(b) Preliminary planning decisions or preliminary decisions as to National Environmental Policy Act or National Forest Management Act processes made prior to release of final plans, guides, and environmental documents.

(c) Recommendations of Forest Service line officers to higher ranking Forest Service or Departmental officers or to other entities having final authority to implement the recommendations in question, such as wilderness and wild and scenic river recommendations.

8. Amend § 217.7 by revising paragraphs (b), (c), and (d) and by removing paragraph (e) to read as follows:

§ 217.7 Levels of appeal.

(b) *Decisions made by Forest Supervisors and Regional Foresters.* The levels of available review are as follows:

(1) If the decision is made by a Forest Supervisor, the notice of appeal is filed with the Regional Forester;

(2) If the decision is made by a Regional Forester, the notice of appeal is filed with the Chief of the Forest Service.

(c) *Discretionary review of dismissal decisions.* Dismissal decisions rendered by Forest Service line officers pursuant to this part (§ 217.11) are subject to discretionary review as follows:

(1) If the initial Reviewing Officer was the Regional Forester, the Chief has discretion to review.

(2) If the Reviewing Officer was the Chief, the Secretary of Agriculture has discretion to review.

(d) *Discretionary review of appeal decisions.* Appeal decisions rendered by Regional Foresters and the Chief pursuant to this part are subject to discretionary review as follows:

(1) If the Reviewing Officer was the Regional Forester, the Chief has discretion to review.

(2) If the Reviewing Officer was the Chief, the Secretary of Agriculture has discretion to review.

9. Amend § 217.8 by removing paragraphs (f)(1) and (f)(3) and redesignating paragraphs (f)(2) and (f)(4) as (f)(1) and (f)(2), respectively, and by revising paragraph (a)(2) to read as follows:

§ 217.8 Appeal process sequence.

(a) * * *

(2) File the notice of appeal within 45 days of the date specified in the published legal notice for non-significant amendments to land and resource management plans documented in a Decision Notice or Record of Decision.

* * * * *

10. Revise paragraph (i) of § 217.10 to read as follows:

§ 217.10 Implementation and stays of decision.

* * * * *

(i) A Reviewing Officer's decision on a request to stay implementation of a project or activity included in a Land and Resource Management Plan or significant amendment or revision to the

plan is not subject to discretionary review at the next administrative level.

* * * * *

11. Revise paragraph (a) of § 217.14 to read as follows:

§ 217.14 Intervention.

(a) For a period not to exceed 20 days following the filing of a notice of appeal, the Reviewing Officer shall accept requests to intervene in the appeal from any interested or potentially affected person or organization. Requests to intervene in an appeal during the discretionary review (§ 217.7(d)) shall not be accepted.

* * * * *

12. Revise paragraph (a) of § 217.15 to read as follows:

§ 217.15 Appeal record.

(a) Upon receipt of a copy of the notice of appeal, the Deciding Officer shall assemble the relevant decision documentation (§ 217.2) and pertinent records, and transmit them to the Reviewing Officer within 30 days in appeal of non-significant amendments to land and resource management plans or within 60 days for appeals of land and resource management plan approvals, significant amendments, or revisions, and for other programmatic decisions. The time period for forwarding the decision documentation is not extendable.

* * * * *

13. Revise paragraph (e) of § 217.16 to read as follows:

§ 217.16 Decisions.

* * * * *

(e) Unless a higher level officer exercises the discretion to review a Receiving Officer's decision as provided at § 217.7(d), the Reviewing Officer's decision is the final administrative decision of the Department of Agriculture and the decision is not subject to further review under this part.

14. In § 217.17, revise paragraphs (b), (c) and (f) to read as follows:

§ 217.17 Discretionary review.

(b) As provided for a §§ 217.7 (c) and (d), 217.10(h), and 217.11, certain dismissal decisions rendered by Forest Service line officers, and appeal decisions rendered by Regional Foresters and the Chief (§ 217.16) are subject to discretionary review at the next highest administrative level. Within one day following the date of any decision subject to such discretionary review, the Reviewing Officer shall forward a copy of the decision and the decision documents (§ 217.2) upon which the appeal was predicated to the next higher officer.

(c) When a stay of implementation is in effect, it shall remain in effect until the end of the 15-day period in which a higher level officer must decide whether or not to review a Reviewing Officer's decision (§ 217.17(d)). If the higher level officer decides to review the Reviewing Officer's decision, the stay will remain in effect until a decision is issued (§ 217.17(f)), or until the end of the 30-day review period provided in § 217.17(g) whichever is less.

* * * * *

(f) The discretionary level Reviewing Officer shall conclude the review within 30 days of the date of the notice issued to participants that the lower decision will be reviewed, and shall send a copy of the review decision to all participants.

* * * * *

Dated: October 29, 1993.

James R. Lyons,

Assistant Secretary, Natural Resources and Environment.

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Senator Leahy Amendment Forest Service Appeals Process

